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In the Supreme Court of the United States

No. 404.

OCTOBER TERM, 1947.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN,
OCEAN LODGE NO. 76, PORT NORFOLK LODGE NO. 775, W. M. MUNDEN,
Petitioners,

vs.

TOM TUNSTALL,
NORFOLK SOUTHERN RAILWAY COMPANY,
Respondents.

PETITIONERS' REPLY TO RESPONDENT'S BRIEF OPPOSING PETITION FOR A WRIT OF CERTIORARI.

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May it Please the Court:

Petitioners desire this Court to review a decision by the Circuit Court of Appeals for the Fourth Circuit, that it may thereby ultimately and conclusively resolve a federal question of great public importance which has been in litigation for more than five years and is being made the subject of a tide of litigation following in the wake of the instant case. The Seaboard Air Line Railroad Company has entered appearance as *amicus curiae* to urge issuance of the writ, primarily on the grounds that the decree entered by the District Court is impracticable in form and inconsistent with the duties enjoined upon the railroads and the Brotherhood by the Railway Labor Act.

The respondent Tunstall opposes the granting of the writ by asserting that—

"—Questions One and Two presented by Petitioners (whether the Railway Labor Act prevents the Brotherhood from alleviating the employment conditions of the promotable firemen caused by the presence of large numbers of non-promotable firemen, by restricting the assignment rights of non-promotable firemen) are irrelevant." (p. 11, respondent's brief.)

To say that the questions presented by the petition for a writ of certiorari are "irrelevant," is gross unrealism. It is a deliberate glossing of the issues basic in this litigation, or it represents a failure by respondent to grasp the consequences inherent in the destruction of the February 18, 1941, agreement and the plan it embraces.

The issue before this Court when it rendered its original decisions in the *Steele* and *Tunstall* cases was made exclusively by the allegations of the complaints. That issue was the Brotherhood versus the Negro firemen. This Court then declared that variations in the contractual treatment of different groups of employees may not be "based on race alone," but that variations in treatment are proper when "based on differences relevant to the authorized purposes of the contract in conditions to which they are to be applied." [1]

Whether there existed in fact variations in the employment conditions of promotable firemen as contrasted with nonpromotable firemen on the southeastern railroads, so as to make proper such variation in treatment of the two groups as is found in the February 18, 1941, agreement, was brought into this case for the first time by the Brotherhood's answer and evidence after the case was remanded to the District Court. The true issue as now revealed by the defense differs vastly from the issue made by the complaint and motion to dismiss in the first instance. *This issue is whether the solution to an operating problem existing on the southeastern railroads, created by the presence of pro-*

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[1] *Steele v. Louisville & Nashville R. R. Co.*, 323 U. S. 192, 203.

motable and nonpromotable firemen on the same roster shall be accomplished by a division of assignments between promotable and nonpromotable firemen, or must be achieved by the forced promotion of all firemen through the establishment of complete equality of rights and responsibilities for firemen.

The District Court held that the solution of this problem must be achieved by extending promotion rights to all firemen.[2] The Circuit Court of Appeals, in affirming the decree of the District Court, did not disaffirm this conclusion.

If the law developed by this litigation is to be that firing assignments may not be apportioned between the members of the firemen's craft on the basis of promotability, with this classification being determined according to rules and custom long established in the industry, the Brotherhood is reluctant to proceed with the performance of what the Court prescribes to be its positive duty as the representative of the firemen's craft, without an affirmance of this conclusion by the Supreme Court. In promulgating equality of promotion rights for all firemen, it is the judgment of those qualified to hold opinions on the subject that this step will entail loss and misfortune for upwards of perhaps a thousand nonpromotable firemen and their families (R. 163, 180).

The questions of law posed by this litigation, and upon the answers to which the introduction of this innovation in the railway industry hinges, are, we submit, questions of great public importance and may not be fairly characterized as "irrelevant."

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[2] "The Brotherhood contends it had no part in creating this practice (not promoting negro firemen to engineers) and then proceeds to act upon the assumption that it has no power to change it. *The Court cannot conclude that the bargaining representative has properly discharged its duty to the plaintiff and his class by acting upon such an assumption.*" (Italics ours.) (R. 31.)

A court, to be aware of the implications and consequences involved in ruling upon the validity of the February 18, 1941, agreement, must be alive to the operating background and needs which sired the February 18, 1941, agreement.[3] Exhibits "J" to "R" of the record in this case graphically illustrate the cause of the promotable firemen's grievances which lie at the bottom of this litigation. These Exhibits are reproductions of the firemen's seniority rosters on a number of the seniority districts comprising portions of the southeastern railroads, parties to the February 18, 1941, agreement. Following each fireman's name appears a block proportioned in length to that fireman's relative seniority as a fireman. The block appears as black or white, corresponding to that fireman's classification as a promotable or nonpromotable fireman (R. 178).

The impenetrable barrier presented by the nonpromotable firemen to the normal advancement of the promotable firemen up the roster in preparation for promotion to engineer is apparent by a glance at these Exhibits. The block of nonpromotable firemen at the top of the firemen's roster are as fixtures. They continuously hold the important freight and passenger assignments on their seniority districts, relinquishing them only upon death, retirement or disability (R. 174, 178).

The problem thus created for the promotable firemen has a dual effect. *First,* promotable firemen are prevented from acquiring experience on the locomotives and familiarity with the runs comprising the more important freight and passenger schedules before they are called to assume the responsibilities of engineers (R. 162-163). *Second,* being thus prevented during their careers as firemen from

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[3] "Particularly when dealing with legal aspects of industrial relations is it important for courts not to isolate legal issues from their workaday context." *Bethlehem Steel Company vs. New York State Labor Rel. Bd.,* 330 U. S. 767, 779.

holding the more important freight and passenger assignments, promotable firemen are forced to accept the lower paid and less desirable assignments during the greater part of their service lives (R. 159-160; 184, 189). Only by reaching senior positions on the engineers' roster can they command assignments comparable in pay and desirability to the assignments generally held by nonpromotable firemen (R. 162).

Added to these discriminations borne by the promotable firemen is the burden of study and training required of them before they can pass the promotion examinations, and the penalty they stand to suffer if they fail in these examinations (R. 161, 175-178, 185). The complexity of these examinations and the high order of technical knowledge and judgment anticipated by them are illustrated by Exhibits "C" to "I" and Exhibits "AA" and "BB." Mute proof that promotion examinations are no formality is provided by the record of experience on one railroad, the Atlantic Coast Line, where sixty-two promotable firemen were discharged from the service between 1939 and 1946 for failure to pass promotion examinations (R. 186-187).

This, in sketch, is the problem facing promotable firemen on the southeastern railroads and calling for a solution. The methods available for solving it are patent. They consist either in removing the block of nonpromotable firemen through forced promotion of all firemen in their regular turn, or of breaking up the block created by the nonpromotables by dividing the available assignments in the several classes of train service between promotable and nonpromotable firemen on a percentage basis.

The latter method was chosen by the contracting parties to the February 18, 1941, agreement as the one least productive of interference with the status quo of individual rights and railroad operations (R. 180-181). If this plan of apportioning assignments is outlawed, then allayment of the promotable firemen's grievance must come through

establishing equality of promotion rights and responsibilities for all firemen. This means that on all seniority districts where nonpromotable firemen occupy the upper portion of the roster, these firemen must promptly prepare for and take promotion examinations.

There are 1,325 colored and white nonpromotable firemen listed on the seniority rosters comprising Exhibits "J" to "R."[4] The great majority of these men, as evidenced by their seniority dates, are in their later years. They are without the educational qualifications essential to understanding and passing the standard promotion examinations. The probability is that a substantial proportion of these men are incapable of meeting the educational and character standards required of engineers, and will perforce suffer the same penalty that promotable firemen have long been subjected to.

The establishment of equal promotion rights for all firemen with the consequences that it promises to hold for so large a segment of railroad employees ought not be put into operation until this Court, as the forum of last resort, has considered the instant case on its merits and reached the conclusion that dividing assignments between promotable and nonpromotable firemen is an unlawful solution of the problem. These petitioners submit that this problem presents a federal question of great public importance deserving decision by this Court.

Respectfully submitted,

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[4] On all of the railroads party to the agreement of February 18, 1941, there are a total of 1,647 employed nonpromotable firemen, constituting approximately twenty-five percent of all firemen listed on the seniority rosters. (R. 67.)